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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-842

TIDEE PRODUCTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS *

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce

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* Pursuant to Rule 42(2) of the Rules of this Court, written consents of the parties to the filing of this brief have been obtained and have been lodged with the Clerk of the Court.

and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in this Court in matters involving important questions concerning the administration and interpretation of the National Labor Relations Act. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests as an aid to this Court's deliberations in a number of such cases. *E.g.*, *Linden Lumber Div., Sumner & Co.* v. *N.L.R.B.*, Nos. 73-1231 and 73-1234 (1974); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union, No. 100*, No. 73-1256; *National Labor Relations Board and Peter G. Nash, General Counsel* v. *Sears, Roebuck and Co.*, No. 73-1233; *International Ladies' Garment Workers'* v. *Quality Manufacturing Co.*, No. 73-765; *N.L.R.B.* v. *Food Store Employees Union, Local No. 347 (Heck's Inc.)*, 417 U.S. 1 (1974); *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, No. 72-1598 (1974); *N.L.R.B.* v. *The Boeing Company, et al.*, 412 U.S. 84 (1973); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Burns Int'l. Security Services, Inc.*, 406 U.S. 272 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

The question presented in the instant case—whether the National Labor Relations Board has the statutory power to assess an unsuccessful respondent in a Board unfair labor practice proceeding with the expenses, including attorney fees, incurred by the charging party in the investigation and litigation of that proceeding—is a matter of significant concern not only to the Chamber's mem-

bership but also for the administration of the Act generally. Indeed, the Board's decision to award litigation expenses affects the interests of every litigant who is now, or will in the future appear before it, in an unfair labor practice case. There is an unsatisfied need on the part of these litigants to know whether the Board has the statutory authority to tax them for litigation expenses should they contest and lose an unfair labor practice case. The question posed herein was expressly left open by this Court's decision in *N.L.R.B.* v. *Food Store Employees Union, Local No. 347, supra,* and this threshhold question should be resolved in this case.

ARGUMENT

THE INSTANT CASE POSES A SIGNIFICANT UNANSWERED QUESTION UNDER THE NATIONAL LABOR RELATIONS ACT WHICH SHOULD BE RESOLVED BY THIS COURT

The importance of determining whether the Board has exceeded its statutory power in shifting the cost of attorney fees to the unsuccessful litigant is an issue which impacts upon all present and potential litigants before the Board. Where an issue involves an agency's attempted employment of its statutory authority for the first time in a manner never before exercised in almost forty years, the question deserves the attention of this Court. This is especially true where, as here, a precedent-setting agency decision transforms a remedial statute into a punitive one.

A. The Threshhold Question Presented Herein Transcends The Bounds Of The Instant Case

In *Food Store Employees Union, supra,* this Court held that the court of appeals exceeded its authority by enlarging the Board's order to include the shifting of

litigation and union organizational expenses from the employer to the union. The employer in that case urged that the Court consider not only whether the court of appeals had the statutory authority to shift litigation costs, but as a necessary threshhold question, whether the Board, in the first instance, has such authority. However, since the underlying issue as to the Board's authority was not squarely presented in that case, the Court felt that it did not need to reach it.[1] However, the Court remanded the case to the Board for an explication of its policy of shifting litigation costs in both that case and the instant case.

On remand of *Food Store Employees Union* from this Court, the Board in *Heck's, Inc.*, 215 NLRB No. 142, 88 LRRM 1049 (1974), reaffirmed its asserted statutory authority, although not involved there, to award such costs for the first time in the instant case and in any case in the future without regard to any limitation.[2]

Thus, the threshhold question presented by the instant case is whether the Board has statutory warrant to award

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[1] Contrary to the employer, the Board successfully urged the Court that the underlying issue need not be reached in the *Food Store Employees* case, but as this Court has done in other contexts, could be determined later when squarely presented in a subsequent case. See, *Moore* v. *Mead's Fine Bread*, 348 U.S. 115 (1954); *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958), cited in the Solicitor's Supplemental Brief for the National Labor Relations Board at 3-4 in *Food Store Employees*. The instant case squarely presents the issue left open in *Food Store Employees*.

[2] In *Heck's Inc.*, the Board declined to shift litigation expenses for the first time in that case because it deemed Heck's defenses to the unfair labor practice charges to be of "debatable" merit, as opposed to those asserted in the instant case, which the Board felt to be "frivolous". However, the Board expressly stated that it did not deem its exercise of the power questioned herein to be limited by any distinctions it might draw between *Heck's* and *Tiidee*, 88 LRRM at 1052.

such costs.[3] The issue herein, then is of a critical and recurrent nature under the Act.[4]

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[3] Indeed, the other issue presented by the Petitioner herein—whether the Board may award litigation costs to penalize a respondent for legitimately invoking refusal to bargain charges as the only means available to test a Board representation election decision—is a question involving discretion which assumes the statutory power to award such costs in the first place. While the *Amicus* agrees with Petitioner Tiidee that this issue is significant and worthy of review by this Court should it be determined that the Board has the statutory power to award litigation expenses, whether the Board possesses the power in the first instance is the threshhold question which must first be considered in this case.

[4] National Labor Relations Act, as amended, 29 USC Sec. 151, *et seq.*, hereinafter the "Act".

This Court has often reviewed the issue of whether litigation expenses are permitted under other federal administrative and regulatory acts. See, *e.g.*, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), involving the Federal Reserve Act, 12 USC Sec. 248(k); *Fleishmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), involving the Lanham Act, 15 USC Sec. 1051, *et seq.*; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), involving the Securities Exchange Act of 1934, 15 USC Sec. 78n(a); *Hall* v. *Cole*, 412 U.S. 1 (1973), involving the Labor-Management Reporting and Disclosure Act, 29 USC 411, *et seq.*; and *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974), involving the Miller Act, 40 USC Sec. 270, *et seq.*

Consideration of the issue here, under the NLRA, is equally important. Indeed, the Board's General Counsel has recognized the significance of the instant question by requiring that all unfair labor practice charges raising the issue be submitted to the General Counsel's Office of Advice. *Quarterly Report on Case Developments by the National Labor Relations Board General Counsel Peter G. Nash, for the Quarter Ending March 31, 1972.* The General Counsel's report is contained in the record of *National Labor Relations Board and Peter G. Nash* v. *Sears, Roebuck and Company*, No. 73-1233 at p. 152 of the Appendix and was discussed by Counsel for Sears at oral argument of that case before the Court on January 14, 1975.

B. The Remedy Imposed By the Board Impacts Upon The Heart Of The Act; The Statutory Authority To Order Such Relief Must Be Clear

Collective bargaining is the very core of the Act; and while the Board must have a sufficient arsenal of remedies to effectuate that objective, it exceeds its authority when it orders affirmative measures which impact upon the result of the bargaining process. *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

Food Store Employees and the instant case, like *H.K. Porter*, involve the Board's and the courts' efforts to provide workable means of opening up the channels of collective bargaining without exceeding the remedial authority granted under Section 10(c) of the Act.[5] Accordingly, until the instant case, the Board has refrained from influencing the result of that process by awarding "make-whole" relief, including litigation expenses, in refusal to bargain cases, as being compensatory or punitive measures which are contrary to the Act.[6] However, the Board, in the instant case, admittedly ordered an award of litigation expenses in order to deter future infringements of the Act by the Petitioner and "*other persons*".[7] As Judge MacKinnon observed below, the Board-ordered relief herein would obviously serve to deter employers from contesting a Union's claim to represent its employees, but such an argument proves too much. The question is whether that "deterrent" exceeds the Board's authority under the Act. Such authority must appear clearly in the Act.

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[5] 29 USC Sec. 160(c).

[6] *Ex-Cell-O Corporation*, 185 NLRB 107 (1970).

[7] *Tiidee Products, Inc.*, 196 NLRB 157, 159 (1972).

C. The Board Does Not Have Statutory Warrant To Assess An Unsuccessful Party With The Litigation Expenses Of A Successful Charging Party

1. Unlike other federal statutes which expressly provide for the recovery of litigation costs by the victorious party,[8] Congress refrained from granting the Board such authority in unfair labor practice cases. Accordingly, the power to award such costs cannot be implied. *Fleishmann Distilling Corp.* v. *Maier Brewing Co., supra*, at 720.

2. The Board, unlike the federal courts, possesses no broad equitable powers. The Board is an agency established by statute to secure the right of employees to bargain collectively for their mutual benefit. The Board's authority under Section 10(c) is therefore limited to ordering *remedial* measures which have a nexus with the purpose of the Act.[9] Consistent with the remedial purpose of the Act, Congress established no compensatory relief except "in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay."[10] The Board, however, has no authority to

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[8] See, *e.g.*, Interstate Commerce Act, Section 16, 49 USC Sec. 16(2); Clayton Act, Sec. 4, 15 USC Sec. 15; Packers and Stockyards Act, 1921 Sec. 309(f), 7 USC Sec. 210(f); Perishable Agricultural Commoditiies Act Sec. 7(b), 7 USC Sec. 499g(b); Trust Indenture Act of 1939 Sec. 323(a), 15 USC Sec. 77www(a); Securities Act of 1933 Sec. 11a, 15 USC Sec. 77K(e); Securities Exchange Act of 1934 Sec. 9(e), 18(a), 15 USC Secs. 781(e), 78n(a); Copyright Act Sec. 116, 17 USC Sec. 116; Fair Labor Standards Act of 1938 Sec. 16(b), 29 USC Sec. 216(b); Servicemen's Readjustment Act Sec. 1822(b), 38 USC Sec. 1822(b); Civil Rights Act of 1964 Sec. 706(k), 42 USC Sec. 2000e-5(k); Railway Labor Act Sec. 3(p), 45 USC Sec. 153(p); and the Communications Act of 1934 Sec. 206, 47 USC Sec. 206.

[9] *H. K. Porter* v. *N.L.R.B., supra.*

[10] *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 565, 665 (1964).

order compensatory damages;[11] and litigation costs and counsel fees are damages as defined by this Court.[12] Nor is the Board permitted to extract punitive relief as a deterrent to future conduct proscribed by the Act.[13]

Thus, while courts, in the exercise of their equitable powers, are permitted to award a successful party litigation costs where his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons", such "fee shifting" is acknowledged to be punitive, *Hall* v. *Cole*, *supra*, and the Board may not award punitive damages. *Republic Steel Corp.* v. *N.L.R.B.*, *supra*.

Although this Court also observed in *Hall* that even absent specific statutory mandate, a federal court, exercising its equitable power, may award counsel fees when the interests of justice so require, this inherent equitable power does not extend to the Board or to other administrative agencies. Rather, as stated, agencies such as the Board may exercise only powers expressly bestowed upon them by statute. *H.K. Porter* v. *N.L.R.B.*, *supra*.

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[11] The legislative history of the Act evinces that Congress deliberately excluded damage awards from the Board's arsenal of remedies. Thus, Senator Wagner's initial version of the original Act would have granted the Board authority, *inter alia*, to order a party found guilty of a violation to pay damages. 80 Cong. Rec. 3445 (1934). This provision and an even milder form, later introduced by Senator Wagner, providing for "restitution" (S. 1958, 74th Cong. 1st Sess. (1935)), were struck down, and the remedy provision of Section 10(c) was enacted to read as it does today.

Moreover, in 1947, the views of Senator Taft, the co-sponsor of the 1947 revisions of the Act, prevailed, and Congress rejected giving the Board the power to award damages for breaches of collective bargaining agreements or violations of the secondary boycott provisions. 93 Cong. Rec. 4858 (1947). See, McGuiness, *Is The Award Of Damages For Refusals To Bargain Consistent with the National Labor Policy?*, 214 Wayne L. Rev. 1086 (1968).

[12] *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962).

[13] *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7 (1940).

In addition, under the rationale of *Hall*, absent statutory authorization, litigation costs may be shifted only when the unsuccessful party has been guilty of contemptuous conduct; or where the litigation has bestowed a "substantial benefit on the members of an ascertainable class . . ."; or where the successful plaintiff is acting as a "private attorney general". These three considerations do not exist in this case. No class exists within the meaning of *Hall* or *Mills* v. *Electric Auto Lite Co., supra*; there is no need to vindicate public rights by the litigation of a "private attorney general"; there has been no contemptible conduct. Consequently, the Board's unprecedented action in this case exceeds the authority granted it by the Act and cannot be justified by any exception enjoyed by the courts in the exercise of their equitable powers. *Certiorari* should be granted to review the Board's action.

Respectfully submitted,

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